

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

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MACTEC, INC.,

*Petitioner,*

v.

STEVEN GORELICK,

*Respondent.*

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**On Petition For A Writ of Certiorari  
To The United States Court of Appeals  
for the Tenth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether arbitration agreements may alter the judicial review provisions of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, including in this case eliminating any right to appeal from an adverse decision of the district court, an issue as to which the courts of appeal are in clear and acknowledged conflict.

2. Whether the interpretation of such an agreement purporting to alter federal statutory procedures is governed by federal common law, as the Tenth Circuit presumed in this case, or the state law governing the interpretation of the agreement, as the Fifth Circuit has determined.

(ii)

**RULE 29.6 CORPORATE DISCLOSURE  
STATEMENT**

Petitioner MACTEC, Inc. is a privately held corporation. No entity currently owns more than 50% of the stock of MACTEC, Inc. Wachovia Capital Partners 2002, LLC, which owns more than 10% of MACTEC, Inc., is an indirect subsidiary of Wachovia Corp., a publicly traded company.

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## OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 427 F.3d 831. The opinion of the district court (App., *infra*, 19a-40a) is unreported. The award of the arbitrator is reproduced at App., *infra*, 41a-43a.

## JURISDICTION

The court of appeals entered its judgment on October 26, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Section 16 of the Federal Arbitration Act, 9 U.S.C. § 16, states in part that “[a]n appeal may be taken from (1) an order ... confirming or denying confirmation of an award or partial award.”

## STATEMENT

### A. The Dispute and the Arbitration

This case arises out of a multi-million dollar dispute over the meaning of a short amendment (the “Revision”) to an agreement between Petitioner MACTEC, Inc. (“MACTEC”) and respondent Steven Gorelick. Gorelick contended that MACTEC, as a result of the Revision, owed Gorelick \$3,000 per use of any type of groundwater remediation well, even public domain technology. MACTEC claimed the Revision related only to the two patented technologies specifically mentioned in the Revision.

Three years after the execution of the Revision, Gorelick initiated arbitration pursuant to the arbitration

clause in the original agreement. At the June 10, 2002 hearing on the matter, MACTEC repeatedly attempted to introduce evidence supporting MACTEC's interpretation of the Revision, including written evidence showing Gorelick's acquiescence for almost three years to MACTEC's construction of the Revision, the absurdity of a construction of the Revision under which MACTEC would have agreed to pay Gorelick \$3,000 for each remediation well, even though MACTEC's total gross profit per remediation well was about \$200, and other evidence. All of the evidence proffered by MACTEC was admissible under California law, which governed the Revision and the arbitration.<sup>1</sup> Under California law, there is no contract that is "impervious to attack by parol evidence . . . the court *must* consider extrinsic evidence of possible ambiguity. *Trident Center v. Connecticut General Life Ins. Co.*, 847 F.2d 564, 569 (9<sup>th</sup> Cir. 1988) (applying California law) (emphasis added).

At the opening of the hearing, however, the single arbitrator announced that, contrary to California law, he would refuse to consider any extrinsic evidence of possible ambiguity, ruling that since he believed the agreement was plain and unambiguous extrinsic evidence was inadmissible. He said during opening arguments, "We're not going to get into what intentions were . . . because it's a contract case."<sup>2</sup> The arbitrator repeated this position throughout the hearing.

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<sup>1</sup> Section 11 of the agreement provided that "[t]his Agreement shall be governed by the laws of the State of California in every respect, including but not limited to validity, interpretation and performance and breach."

<sup>2</sup> Hearing Tr. at 22, Ct. App. App. at 210.